

**Codification and creation of community and customary laws in the South Pacific and Beyond
Australia National University, 26-27 July 2018**

Navigating CEDAW obligations and ‘custom’ in Samoa

Safua Akeli Amaama
National University of Samoa

In 2017 the Samoa Law Reform Commission (SLRC) report on Samoa’s compliance to the Convention for the Elimination and Discrimination Against Women (CEDAW) was tabled with the Parliamentary Committee. Although Samoa had ratified the Convention in 1992, the CEDAW Committee in 2012 articulated concerns about women’s political participation and violence against women. A key recommendation from the SLRC was the amendment of the *Village Fono Act* (1990) to ‘exclude consideration of customary practices’ such as *ifoga* (cultural apology by an offender or his/her family) in cases of violence against women. This paper explores the broader implications for codifying customary practices, upholding Samoa’s constitution, and compliance to CEDAW.

Keywords: CEDAW, Village Fono Act, ifoga,

Introduction

Samoa’s current population of 195,979¹ is organized into 369 villages, which include traditional and non-traditional villages.² Traditional villages are governed by a village fono or council of chiefs who represent their families, they have a fa’alupega (village constitution), and a Sui o le Nu’u (the village mayors of traditional villages) who liaises with government. Until the *Village Fono Act* (1990), council decisions were the prerogative of chiefs, and outside the reach of government. However, under the Act, the village fono, although empowered to exercise their authority, are required to register council decisions, in line with the Constitution, with the CEO of the Ministry of Women, Community and Social Development (MWCSO) which administers the Act.³ The MWCSO also administers the *Internal Affairs Act* (1995) which provides ‘for the

¹ Samoa Bureau of Statistics Census 2016, Preliminary Count [Census Brief No.1 (Revised Version)].

² L Meleisea, M Meredith, M Chan Mow, P Schoeffel, S Lauano, H Sasa, R Boodoosingh, M Sahib 2015, *Political Representation and Women’s Empowerment in Samoa*, Volume 2, Research Methods and Results, Centre for Samoan Studies, National University of Samoa, p.14. According to this study, ‘traditional’ refers to villages with both a village mayor (Sui o le Nu’u) and a village council. A ‘non-traditional’ village may have a village mayor (Sui o le Malo) but not a village council.

³ See *Village Fono Act* (1990). Also see ‘Pule a le Matai Sa’o, Pepa o Talanoaga’, Samoa Law Reform Commission, July 2016.

promotion of the well-being of villages, village authority' and 'for matters relating to the culture and traditions of Samoa'.⁴ It further outlines the duties of the Sui o le Nu'u and Sui o le Malo (the village mayors of non-traditional villages) which includes 'to promote harmony in his or her village' and 'to encourage the maintenance of law and order'.⁵ Recently, there has been an addition of a women's representative (Sui o Tama'ita'i) for each village.

While the *Village Fono Act* covers individuals residing on village customary land, those who live on government, freehold or leasehold land are exempted from the village rules. Although there are cases of village people occupying freehold land, and playing an active role in village affairs. However, any person who disturbs the 'harmony within the village' may be summoned by the fono. The register of council decisions is open to public scrutiny. In some cases, village by-laws have legal recognition, for example, the Village Fisheries By-laws in line with the 'national Fisheries Legislation' is 'accorded legal recognition', which includes restrictions on fish and shellfish or bans on some fishing methods.⁶ Scholars suggest the *Village Fono Act* 'must provide clearer guidelines firstly on developing village rules' and 'secondly on the scope within which the traditional powers of the village councils may be exercised'.⁷

The codification of Samoan customs began in the colonial period. Under German rule (1900-14), a Lands and Titles Commission⁸ was established in 1903 which centralized lands and titles disputes in the Apia port-town. Disputes were presided over by European judges and Samoan advisers, for situations outside the usual customary practice where a dispute was the privilege of village council or associated family members. Similarly, the *Land and Titles Act* (1981) aims to 'codify the customary law of Samoa in order to regulate disputes among Samoans in relation to customary land and titles'.⁹ The customary practice of 'ifoga or the 'public act of self-humiliation-accompanied by the gift of 'ie toga' or finely woven mats is a recognized disputes resolution method.¹⁰ Scholars acknowledge this custom is rarely applied unless in very serious circumstances where a death has occurred or a serious crime has been committed.¹¹ According to the SLRC report, 'ifoga as a 'customary reconciliation' has 'resulted in a reduction of

⁴ See Internal Affairs Act (1995).

⁵ Ibid.

⁶ U. Fa'asili & I Kelekolio 1999, 'The Use of Village By-laws in Marine Conservation and Fisheries Mangement', Fisheries Division, Ministry of Agriculture, Forests, Fisheries and Meteorology, Apia, Western Samoa, 1st Secretariat of the Pacific Community Heads of Fisheries Meeting, Noumea, New Caledonia, 9-13 August.

⁷ T. Lalotoa Seumanutafa 2018, *Law Reform in Plural Societies*, Springer: Germany, p.149.

⁸ M. Meleisea 1987, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa*, Suva, Institute of Pacific Studies of the University of the South Pacific. F. Aiono-Le Tagalao 2009, 'The Land and Titles Court of Sāmoa 1903–2008: Continuity amid Change,' (PhD thesis, University of Otago).

⁹ Samoa Law Reform Commission 2016-17, 'Samoa's Legislative Compliance with the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)', report, p. 14.

¹⁰ Cluny & La'avasa Macpherson 2005, 'The Ifoga: The Exchange Value of Social Honour in Samoa', *Journal of the Polynesian Society*, 114, 2, pp.109-134.

¹¹ Ibid.

sentence in cases involving violence against women'.¹² This is a concern since the compliance indicators state that customary practices 'shall not affect criminal prosecution or sentencing' as 'ifoga 'may prevent adequate sanctions being imposed on perpetrators of violence against women'.¹³

Currently, Samoa has in place a community based justice system based on the *Community Justice Act* (2008). Unlike the SLRC recommendation, the Act provides 'opportunities for Samoan custom and tradition to be recognized in the sentencing, rehabilitation and reintegration of offenders'.¹⁴ Thus, the exclusion of the practice of ifoga in the case of violence against women is a complex issue, partly because of the legal framework but also since the punishments are imposed according to 'custom and usage of its village'.¹⁵ However, criminal offences are under the jurisdiction of the Supreme Court, who although consider customary practices, ultimately administer the law.

Samoa ratified the Convention for the Elimination and Discrimination Against Women (CEDAW) in September 1992, however for the most part, Samoa's compliance record has been non-committal. In 2012, the CEDAW committee articulated concerns about women's political participation and violence against women. The committee further expressed concern that 'women themselves, especially those in rural and remote areas, are not aware of their rights under the Convention, and thus lack the necessary information to claim their rights'.¹⁶ Despite these concerns, the report on Sex Offenders states that 'the Samoan Courts are required by law to take into account as mitigation of sentence any punishment already imposed on the offender by his or her village council or any *ifoga*'.¹⁷ Samoa's constitution is a blend of Samoan custom and liberal democracy, and thus recognizes the fundamental rights of its citizens. Additionally it includes the broad term 'according to custom and usage'.¹⁸ As this paper demonstrates, Samoa's efforts to comply with CEDAW have complex implications at the village and national governance level. If 'ifoga is a mitigating tool and a customary conflict resolution method, there are concerns to address this issue in the broader gender framework in line with Samoa's National Policy for Gender Equality (2016-20).

¹² SLRC report 2016-17, p.34, fn.99.

¹³ SLRC report 2016-17, p.34, fn.100-101.

¹⁴ See under section titled 'Purpose' (e) of the *Community Justice Act* (2008).

¹⁵ See under section '2A' (b) of the *Village Fono Amendment Act* (2017). Also see Jivan, V and Forster, C 2009, 'Challenging Conventions: In Pursuit of Greater Legislative Compliance with CEDAW in the Pacific', *Melbourne Journal of International Law*, 10, 2, pp. 1-36.

¹⁶ See CEDAW committee report, 52nd session, 9-27 July 2012, CEDAW/C/WSM/4-5, p.3.

¹⁷ See Report on Sex Offenders Register, 2016, Samoa Law Reform Commission, pp.76-77.

¹⁸ A So'o 2007, *Democracy and Custom in Samoa: An Uneasy Alliance*, Fiji, Institute of Pacific Studies.